Said Ghavam v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-05–76 OF 2011

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ABDUL MALIK ISHAK, AZAHAR MOHAMED AND ZAWAWI SALLEH JJCA

23 MAY 2013

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Criminal Procedure — Appeal — Appeal against conviction — Offence of drug trafficking — Offending drugs found in accused's jeans and contraband — Contraband pointed by accused — Accused found guilty by court and convicted of charges — Whether defences an afterthought — Whether trial judge correct in admitting evidence of conduct under s 27 and/or s 8 of the Evidence Act 1950 — Whether trial judge appreciated defence case — Whether accused prejudiced

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Acting on information received, SP3 led three other police personnel to an apartment and upon their arrival, the front door was locked from inside. SP3 knocked at the door and 10 minutes later, it was opened by the appellant. A body search on the appellant revealed four small plastic packets in the front right pocket of the appellant's jeans, each containing a substance which was later confirmed by the chemist to be 0.92g methamphetamine, the subject matter of the second charge. When questioned on whether he was keeping any more contraband, the appellant led SP3 to a bathroom and pointed his lips upwards to the ceiling of the bathroom. Inside the ceiling, three plastic packets each containing substances were retrieved. A chemical analysis revealed that the substances were indeed 94.5g of methamphetamine. This formed the subject matter of the first charge. The appellant was charged with two counts of drug trafficking under ss 39B(2) and 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). In his defence, the appellant averred that the apartment belonged to his friend ('Majid'). When the appellant arrived at the apartment unit, he saw three unknown ladies inside the apartment. He then retired to the bedroom. When the police arrived, the ladies were the ones who opened the door. According to him, three police personnel later emerged from the bedroom holding plastic packets. The appellant denied knowledge of the contraband. The trial judge, after hearing the appellant's defence, found him guilty and convicted him of the offence. The instant appeal was only with respect to the first offence under s 39B(1)(a) of the DDA. In the present appeal, the appellant contended that the learned trial judge erred in admitting the evidence of conduct under s 27 and/or s 8 of the Evidence Act 1950 ('the Act'); that the learned trial judge failed to appreciate the defence case; and that the appellant was prejudiced and tactically disadvantaged when the trial judge held that there

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A was actual trafficking and at the same time, invoking the presumption of trafficking under s 37(da) of the DDA.

Held, dismissing the appeal:

B (1) The conduct of the appellant in pointing towards the ceiling board with his lips and the subsequent recovery of the three plastic packets inside the ceiling was relevant and admissible as evidence under s 27 of the Act and as evidence of conduct under s 8 of the Act. If not for the appellant's conduct, SP3 would not have known the existence of the drugs. By that, the appellant must be inferred to have knowledge that the drugs were C kept in the ceiling. The conduct of appellant should not be taken in isolation but together with all the other facts and circumstances of the case (see paras 22 & 32).

(2) The learned trial judge had rightly categorised the defence as an D afterthought. The existence of Majid, Razak and the three ladies were never mentioned to the investigating officer and were never put to the prosecution witnesses especially during cross-examination. Although a court might view with suspicion a defence which had not been put to the appropriate prosecution witnesses who might have personal knowledge E of the point at issue, the court was still bound to consider the defence, no matter how weak the defence was (see paras 34–35).

(3) To say that the learned trial judge failed to appreciate the defence of the appellant was totally misconceived. The learned trial judge did not reject the appellant's defence on the simple ground of belated disclosure. There F was no miscarriage of justice that called for appellate intervention. The overwhelming evidence compelled this court to agree with the decision of the learned trial judge (see para 36).

(4) It was safe to convict the appellant. There was ample, indeed G overwhelming evidence at the close of the prosecution's case to warrant the conclusion of the trial judge that the prosecution had established that the appellant was concerned in trafficking in the offending drugs. The defence of the appellant had fallen far short of rebutting the presumption of trafficking on the balance of probabilities and as such, it had not raised H a reasonable doubt as to his guilt which the prosecution had established beyond reasonable doubt (see para 47).

[Bahasa Malaysia summary

I Bertindak atas maklumat yang diterima, SP3 membawa tiga penjawat polis lain ke sebuah apartmen dan setibanya mereka di situ, pintu depan dikunci dari dalam. SP3 mengetuk pintu itu dan 10 minit kemudian, ia telah dibuka oleh perayu. Satu carian badan ke atas perayu dilakukan dan ditemui empat bungkusan plastik kecil di poket kanan bahagian depan seluar jeans perayu, setiap satu mengandungi suatu bahan yang kemudian disahkan oleh ahli kimia

sebagai 0.92g metamfetamin, hal perkara pertuduhan kedua. Apabila disoal sama ada dia menyembunyikan barang seludup lain, perayu membawa SP3 ke bilik air dan menunjuk dengan muncungnya ke atas siling bilik air itu. Dalam siling itu, tiga bungkusan plastik setiap satu mengandungi bahan telah dijumpai. Analisa kimia menunjukkan bahawa bahan tersebut adalah 94.5g metamfetamin. Ini membentuk hal perkara pertuduhan pertama. Perayu telah dituduh dengan dua pertuduhan mengedar dadah di bawah ss 39B(2) dan 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Dalam pembelaannya, perayu menegaskan bahawa apartmen itu milik kawannya ('Majid'). Apabila perayu tiba ke unit apartmen itu, dia melihat tiga wanita yang tidak dikenali di dalam apartmen itu. Dia kemudian masuk ke bilik tidur. Apabila polis tiba, wanita-wanita tersebut yang membuka pintu. Menurutnya, tiga penjawat polis kemudian keluar daripada bilik tidur memegang bungkusan-bungkusan plastik itu. Perayu menafikan yang dia mempunyai pengetahuan tentang barang seludup itu. Hakim perbicaraan, setelah mendengar pembelaan perayu, mendapatinya bersalah dan mensabitkannya kerana kesalahan itu. Rayuan ini hanya berkaitan kesalahan pertama di bawah s 39B(1)(a) ADB. Dalam rayuan ini, perayu berhujah bahawa hakim perbicaraan yang bijaksana terkhilaf kerana menerima keterangan perlakuan di bawah s 27 dan/atau s 8 Akta Keterangan 1950 ('Akta tersebut'); bahawa hakim perbicaraan yang bijaksana gagal menerima kes pembelaan; dan bahawa perayu telah diprejudiskan dan secara taktikal kurang bernasib baik apabila hakim perbicaraan memutuskan bahawa pengedaran sebenar wujud dan pada masa sama, menggunakan andaian pengedaran di bawah s 37(da) ADB.

Diputuskan, menolak rayuan:

(1) Perlakuan perayu yang menunjuk ke papan siling dengan muncungnya dan berikutan itu tiga bungkusan plastik dijumpai dalam siling itu adalah relevan dan diterima sebagai keterangan di bawah s 27 Akta tersebut dan sebagai bukti perlakuan di bawah s 8 Akta tersebut. Jika bukan kerana perlakuan perayu, SP3 tidak mungkin mengetahui kewujudan dadah itu. Oleh demikian, perayu hendaklah diberi inferens kerana mempunyai pengetahuan bahawa dadah itu disimpan dalam siling itu. Perlakuan perayu tidak patut dianggap berasingan tetapi bersama dengan semua fakta dan keadaan lain kes itu (lihat perenggan 22 & 32).

(2) Hakim perbicaraan yang bijaksana dengan betul telah mengkategorikan pembelaan itu sebagai suatu yang telah difikirkan kemudian. Kewujudan Majid, Razak dan tiga wanita itu tidak pernah disebut kepada pegawai penyiasat dan tidak diletakkan sebagai saksi-saksi pendakwaan terutamanya semasa pemeriksaan balas. Walaupun mahkamah mungkin melihat dengan syak pembelaan yang tidak dikemukakan kepada saksi-saksi pendakwaan yang sepatutnya mungkin mempunyai

pengetahuan peribadi berhubung isu tersebut, mahkamah masih terikat untuk mempertimbangkan pembelaan itu, tidak kira jika pembelaan itu lemah (lihat perenggan 34–35).

(3) Ianya adalah suatu tanggapan salah untuk mengatakan hakim perbicaraan yang bijaksana telah gagal menerima pembelaan perayu. Hakim perbicaraan yang bijaksana tidak menolak pembelaan perayu atas alasan pendedahan yang lewat. Tidak berlaku pelaksanaan yang tidak adil untuk melibatkan campur tangan pihak rayuan. Keterangan yang kukuh mendorong mahkamah ini untuk bersetuju dengan hakim perbicaraan yang bijaksana (lihat perenggan 36).

(4) Ia adalah selamat untuk mensabitkan perayu. Terdapat banyak bukti yang kukuh pada penutup kes pendakwaan untuk mewajarkan kesimpulan hakim perbicaraan bahawa pihak pendakwaan telah berjaya membuktikan bahawa perayu telah terlibat dalam mengedar dadah berbahaya. Pembelaan perayu telah jatuh jauh dari mematahkan anggapan penyeludupan atas imbangan kebarangkalian dan oleh itu, ia tidak menimbulkan keraguan yang munasabah atas kesalahannya yang telah dibuktikan melampaui keraguan yang munasabah oleh pihak pendakwaan (lihat perenggan 47).]

Notes

For cases on appeal against conviction, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 207–215.

Cases referred to

Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209; [1996] 1 CLJ 705, FC (refd)

Amathevelli a/p R Ramasamy v PP [2008] 3 MLJ 782; [2008] 4 CLJ 413, CA (refd)

Andy bin Bagindah v PP [2000] 3 MLJ 644; [2000] 3 CLJ 289, CA (refd)

Chandrasekaran & Ors v PP [1971] 1 MLJ 153 (folld)

Eastman v The Queen (1997) 76 FCR 9, FC (refd)

Francis Antonysamy v PP [2005] 3 MLJ 389, FC (refd)

Ganu Chandra Kashid v Emperor 137 Ind Cas 174, HC (refd)

Kacharji Hariji v State of Gujarat AIR 1969 Guj 100, HC (refd)

Karan Singh v State of UP AIR 1973 SC 1385, SC (refd)

Khoo Hi Chiang v PP and another appeal [1994] 1 MLJ 265; [1994] 2 CLJ 151, SC (refd)

Liza bte Ismail v PP [1997] 2 SLR 454, HC (refd)

PP v Chia Leong Foo [2000] 6 MLJ 705, HC (folld)

PP v Chin Moi Moi [1995] 1 SLR 297, HC (refd)

PP v Lin Lian Chen [1992] 2 MLJ 561; [1992] 1 CLJ (Rep) 285, SC (refd)

PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2005] 6 AMR 203, FC (refd)

PP v Okonkwo & Anor [1993] 3 SLR 610, HC (folld)
PP v Sa'ari bin Jusoh [2007] 2 MLJ 409, FC (refd)
PP v Yuvaraj [1969] 2 MLJ 89, PC (folld)
R v Berriman (1854) 6 Cox CC 388 (refd)
R v Warickshall (1783) 1 Leach 263 (refd)
Ratten v The Queen (1974) 131 CLR 510, HC (refd)
Tunde Apatira & Ors v PP [2001] 1 MLJ 259, FC (refd)
Wai Chan Leong v PP [1989] 3 MLJ 356; [1989] 2 CLJ 1168, SC (refd)
Wjchai Onprom v PP [2006] 5 MLJ 415; [2006] 3 CLJ 724, CA (refd)
Y Jeyamuraly a/l Yesiah v PP [2007] 5 MLJ 224, CA (refd)
Yeap Boon Hai v PP [2010] 2 MLJ 433; [2010] 2 CLJ 405, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 60(1)
Criminal Procedure Code (Cap 68)[SG] 122(5)
Dangerous Drugs Act 1952 ss 37(da), 37A, 39B(1)(a)
Evidence Act 1950 ss 8, 27
Evidence Act (Cap 97, 1990 Ed) [SG] s 27
Police and Criminal Evidence Act 1984 [UK] s 76(4)

Appeal from: Criminal Trial No 45–30 of 2010 (High Court, Kuala Lumpur)

Ranjit Singh Dhillon (J Kaur, Ranjit & Associates) for the appellant.
Munahyza bt Mustafa (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Zawawi Salleh JCA (delivering judgment of the court):

INTRODUCTION

[1] The appellant was tried before the Kuala Lumpur High Court with the following offences:

First charge:

> Bahawa kamu pada 7 Disember 2009 jam lebih kurang 5.00 pagi di No.20-2, Tingkat 20, Blok B, Park View Services, Jalan Changkat Perak, Off Jalan P.Ramlee, di dalam daerah Dang Wangi, di dalam Wilayah Persekutuan Kuala Lumpur, telah mengedar dadah berbahaya iaitu methamphetamine seberat 94.50 gram, dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

Second charge:

A Bahawa kamu pada 7 Disember 2009 jam lebih kurang 5.00 pagi di No.20-2, Tingkat 20, Blok B, Park View Services, Jalan Changkat Perak, Off Jalan P.Ramlee, di dalam daerah Dang Wangi, di dalam Wilayah Persekutuan Kuala Lumpur, telah ada dalam milikan kamu dadah berbahaya iaitu methamphetamine seberat 0.92 gram, dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen
B 12(2) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 12(3) Akta yang sama.

[2] At the end of the defence case, the appellant was found guilty and
C convicted for both counts of offences. The instant appeal was only with respect to the first offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA 1952').

[3] We have heard learned counsel for the appellant and learned deputy
D public prosecutor at some length. We have gone through the records available before us. In our view, the learned trial judge's decision does not suffer from any patent legal infirmity requiring interference by this court. Accordingly, we unanimously dismissed the appeal and affirmed the conviction and sentence passed by the High Court.

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[4] We now give the reasons for our decision.

FACTS OF THE CASE

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[5] If we synchronise the prosecution evidence, the following chronology of events emerges. On 7 December 2009, at about 5am, acting on information received, SP3 (Insp Abd Ghani bin Ishak) led three other police personnel to an apartment No 20–2, Tingkat 20, Blok B, Park View Services, Jalan Changkat
G Perak, Off Jalan P Ramlee, Dang Wangi. On their arrival, SP3 found the front door locked from inside. He knocked at the door and it was opened by the appellant 10 minutes later. SP3 introduced himself as a police officer by showing the appellant his authority card. He also informed the appellant the purpose of the police visit.

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[6] After having conducted a body search on the appellant, SP3 found four small plastic packets (exh P27) in the front right pocket of the appellant's jeans, each containing a substance which he suspected to be a dangerous drug. This was subsequently confirmed by the chemist ('SP6') to be 0.92g of
I methamphetamine, the subject matter of the second charge.

[7] The appellant was then arrested and handcuffed. He was questioned by SP3 whether he was keeping any more contraband. In response to SP3's query, the appellant took SP3 into a bathroom which was located inside a bedroom.

The appellant then looked upwards to the ceiling and used his lips to point upwards to the ceiling of the bathroom.

[8] SP3 then climbed onto the edge of the bathtub and pushed aside a piece of the ceiling board above the bathtub. He found inside the ceiling three plastic packets (exh P29), each containing substances which he suspected to be dangerous drugs. The contents of these plastic packets were later analysed by SP6 and found to contain 94.50g of methamphetamine, the subject matter of the first charge.

[9] SP3 conducted a further body search on the appellant and found a wallet containing a Soleska Republic citizenship card (exh P13), three bank cards (exhs P14, P15 and P16), a Touch & Go card (exh P24) and a Mesra card (exh P25).

[10] Other objects recovered from the room were a weighing scale (exh P17), a bunch of keys (exh P20), two bottles like containers made of glass (exhs P21A and P21B), which SP3 believed were utensils normally used to smoke *syabu*, a type of dangerous drug. SP3 also recovered empty transparent plastic packets (exhs P23(1–22)).

[11] SP3 also found a 'Lee Ebony' shoe box (exh P12), that was partially hidden behind the compressor of the air-conditioner.

Inside the said shoe box were a sum of RM45,000 (in the denomination of RM50).

[12] SP3 then seized and marked the items, and prepared a search list (exh P9). All the seized items were handed over to Insp Fithri Hajirin bin Iberahim ('SP5').

THE DEFENCE CASE

[13] The appellant gave sworn testimony. The appellant testified that the apartment belonged to his friend Majid Safaie, who had emigrated to New Zealand. The appellant knew Majid for 13 years prior to the arrest. Majid had allowed the appellant to stay at the apartment as he had an argument with his wife. On that night, Majid had accompanied the appellant to the apartment.

[14] When he arrived at the apartment unit, he saw three unknown ladies inside the apartment. He then retired to the bedroom as he was very tired.

[15] When the police arrived, the appellant did not open the door as he was not sure of their identity. The appellant telephoned the security guard

informing him of the situation. He was advised not to open the door and wait for the security guard. The ladies however opened the door.

[16] When the police entered the apartment, a policeman by the name of Razak assaulted the appellant on his chest. According to the appellant, Razak had an affair with his wife.

[17] The police allowed the ladies to leave and the appellant was taken to the living room and was asked to sit there. Three police personnel later emerged from the bedroom holding plastic packets. He denied having any knowledge as to the contraband.

[18] The appellant said he kept RM150,000 inside the shoe box. The money is for the purchase of a piece of land in Perak. The appellant also accused the police of taking RM85,000. The appellant denied that the money were the proceeds from the sale of dangerous drugs.

THE GROUNDS OF APPEAL

[19] The appellant is now before us, urging reversal of the decision of the learned trial judge on the following grounds:

(a) that the learned trial judge erred in admitting the evidence of conduct under s 27 and/or s 8 of the Evidence Act 1950;

(b) that the learned trial judge failed to appreciate the defence case; and

(c) that the appellant was prejudiced and tactically disadvantaged when the trial judge held that there was actual trafficking and at the same time, invoking the presumption of trafficking under s 37(da) of the DDA 1952.

[20] We will deal with each of the three grounds advanced by the appellant in turn.

Ground (a): Evidence of conduct

[21] In the present case, the learned trial judge, in dealing with the appellant's gesture in pointing towards the ceiling board with his lips, had this to say:

> Nevertheless, the conduct of the accused in response to the defective caution ie the gesture of the accused in pointing towards the ceiling board with his lips and the subsequent recovery of the three plastic packets inside the ceiling is relevant and admissible as evidence under s 27 of the Evidence Act 1950 (see *Samundee Devan Kerishnan Muthu v Public Prosecutor* [2009] 1 CLJ 498) and as evidence of conduct

under s 8 of the Evidence Act 1950. The court was satisfied that the accused was not forced or induced or promised in any manner to make that gesture. In fact although the accused had alleged that he was beaten by one policeman by the name of Razak he denied that he had made the gesture.

[22] We agree with the ruling of the learned trial judge that s 37A of the DDA 1952 was inapplicable because SP3 was not holding the rank of an inspector at the time he purported to administer the caution to the appellant. Therefore, the caution was defective. Nevertheless, the conduct of the appellant in gesturing to the appellant by pointing towards the ceiling board with his lips and the subsequent recovery of the three plastic packets inside the ceiling is relevant and admissible as evidence under s 27 of the Evidence Act 1950 and as evidence of conduct under s 8 of the Evidence Act (see *Wai Chan Leong v Public Prosecutor* [1989] 3 MLJ 356; [1989] 2 CLJ 1168, *Y Jeyamuraly a/l Yesiah v Public Prosecutor* [2007] 5 MLJ 224, *Karan Singh v State of UP* [1972] All Cr R 125, *Kacharji Hariji v State of Gujarat* AIR 1969 Guj 100).

[23] In *Amathevelli a/p R Ramasamy v Public Prosecutor* [2008] 3 MLJ 782; [2008] 4 CLJ 43, the appellant was charged for the offence of murder. During interrogation, the appellant was said to have given the information:

Encik, rantai leher emas yang saya ambil daripada perempuan itu ada simpan di rumah saya di No. 130 Jalan 5, NJPWGates, Air Hitam ….

[24] The said information was reduced in writing by the police officer and was tendered and marked as exh P51. The defence argued:

… that the learned trial judge ought not to have admitted P51 under section 27 of the Evidence Act 1950. This is because the prosecution, in the trial within a trial through the evidence of Ketua Inspektor Lee Rui Lin (TW1) proceeded on the basis of recording a statement under Section 113 of the Criminal Procedure Code. Thus, it cannot than be admitted as evidence under section 27 of the Evidence Act 1950.

[25] The argument was rejected and after considering *Francis Antonysamy v Public Prosecutor* [2005] 3 MLJ 389, the court went on the basis that voluntariness could never be an issue under s 27. Speaking for the Court of Appeal Raus Sharif JCA (as he then was) said:

In this case, the learned trial judge found all the ingredients of s 27 had been fulfilled. We are in agreement with him. Clearly, the accused gave the information while she was in custody. The information was given to SP12. It was reduced into writing (P51) by SP12. The learned trial judge accepted the evidence of SP12. In fact P51 lent credence to the oral evidence of SP12. These evidences are relevant as it directly connected the accused to the gold chain (P40) recovered from a locked

A cupboard at her house. Accordingly, we find no error on the part of the learned trial judge in admitting P51 as evidence against the accused.

[26] In the circumstances of this case, we are of the view that there is no legal B impediment to turn the cautioned statement into a discovery information.

[27] The next question to be determined on this issue is whether the prosecution can sever a part or parts from the cautioned statement which had been ruled inadmissible and admit it or them under s 27 of the Evidence Act C 1950 as discovery information. In our opinion, the case of *Chandrasekaran & Ors v Public Prosecutor* [1971] 1 MLJ 153 is directly on point. The relevant facts were that two cautioned statements were recorded from the second appellant under s 15 of the then Prevention of Corruption Act. These cautioned statements were rejected by the trial court on grounds of voluntariness. The D prosecution then sought to tender a portion of the statements under s 27 of the then Evidence Ordinance. One of the objections raised by the defence was that once the entire cautioned statement was rejected no portion of it could be admitted under s 27. Raja Azlan Shah J (as his Majesty then was) overruled the objection and explained the rationale for its admissibility under s 27: E

> Section 27 is a concession to the prosecution. It is express intention of the legislature that, even though such a statement is otherwise hit by the three preceding sections viz, ss 24– 26 of the Evidence Ordinance, any portion thereof is nevertheless admissible in evidence if it leads to the discovery of a relevant fact. The reason is that, F since the discovery itself provides the acid test, the truth of the statement that led to the discovery is thereby guaranteed. Admissibility of evidence under s 27 is in no way related to the making of the confession;rather, such evidence is admitted on clear grounds of relevancy as directly connecting to the accused with the object recovered. (See *Public Prosecutor v Er Ah Kiat* [1966] 1 MLJ 9). If a statement which G would otherwise be hit by s 24 of the Evidence Ordinance is not excluded under s 27, a fortiori a statement which would otherwise be hit by s 15 of the Corruption Act cannot be excluded under s 27 of the Evidence Ordinance, because a statement made under s 15 of the Corruption Act is in the nature of one made under s 24 of the Evidence Ordinance.

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[28] We observe that the position is the same in Singapore. In *Public Prosecutor v Chin Moi Moi* [1995] 1 SLR 297 the issue was whether the trial judge ought to have admitted the relevant part of the respondent's statement recorded under s 122(5) of the Criminal Procedure Code(Cap 68) under s 27 I Evidence Act (Cap 97, 1990 Ed) notwithstanding the fact that the statement was ruled inadmissible after a voir dire. Yong Pung How CJ, sitting as a High Court appellate judge answered the question in the affirmative and in the course of the judgment said:

> During the course of submission by counsel for the respondent, I was referred to *Public Prosecutor v Ibrahim bin Mastari* [1980] 2 MLJ 188, a case decided in 1955 but reported at [1980] 2 MLJ 188. In that instant case, Choor Singh J held that s 27 of the Evidence Act must be read subject to s 121(5) of the CPC (now s 122(5)) and rejected a cautioned statement on the ground that the prescribed 'caution' was not properly stated to the accused. With the greatest respect, I disagree with the reasoning of the learned judge. Section 122(3) of the CPC is clear and unambiguous. It clearly provides that the requirements under s 122 are exempted when s 27 of the Evidence Act is applicable. To hold otherwise would render s 27 otiose.

[29] The English common law position on this subject can be found in *R v Warickshall* (1783) 1 Leach 263 and *R v Berriman* (1854) 6 Cox CC 388 which state that the facts discovered in consequence of a confession are admissible though the confession itself is inadmissible. This has now been statutorily enacted in s 76(4) of the Police and Criminal Evidence Act 1984 (per Yong Pung How in *Public Prosecutor v Chin Moi Moi*).

[30] The Indian position has been neatly summarised in *Field's Commentary on Law of Evidence* (12th Ed), where the learned author said:

> The language of the section and the trend of the authority support the view that intention of the Legislature in enacting Sec. 27 of the Act was that the minimum portion of a confession made to a police officer or of information given to him should be admitted into evidence which might reasonably be held to relate distinctly and positively to the fact discovered and which is necessary to be proved in order adequately to explain such discovery.

[31] Field's also quoted Beaumont CJ in *Ganu Chandra Kashid v Emperor* [1932] Bomr 286 where the court observed at p 287–288:

> Where the accused gives information to the police in a form which divides such information into several parts, the part admissible under s 27 can be easily separated. But, where the accused gives his information in the form of a compound statement, the judge must, before he records it as evidence or leaves it to the jury, divide the sentence into what are really its compound parts and only admit that part which had led to the discovery of the particular fact.

(For a detailed discussion on these issues, see *Criminal Trial Advocacy for the Defence*, Hisyam Abdullah @ Teh Poh Teik, 2009, (pp 142–162)].

[32] Based on the facts of the present case, we are of the opinion that if not for the appellant's conduct, SP3 would not know the existence of the offending drugs. By that, the appellant must be inferred to have knowledge that the offending drugs were kept in the ceiling. The conduct of appellant should not be taken in isolation but together with all the other facts and circumstances of

A the case. The evidence relied upon by the prosecution that were accepted by the learned trial judge are as follows:

(a) at the material time, the appellant was the only occupant in the apartment as there was only one bedroom;

B (b) the door was locked from the inside;

(c) it was the appellant who opened the door;

(d) the appellant's personal belongings (as stated above) were found inside the drawer of the dressing table inside the bedroom; and

C (e) the offending drugs were well concealed behind the opaque ceiling board and were not visible to anyone who looks upwards to that spot.

D **[33]** Looking at the facts and circumstances of the case as a whole, we are in agreement with the learned trial judge that the appellant had mens rea possession of the offending drugs. He had the power of disposal over them to the exclusion of all others.

E *Ground (b): Non-appreciation of the defence case*

[34] As stated in paras 13–18 of this judgment, we are of the considered view that the learned trial judge had rightly categorised the defence as an afterthought. The existence of Majid, Razak and the three ladies were never F mentioned to the investigating officer and were never put to the prosecution witnesses especially during cross-examination (*Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561; [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285, *Yeap Boon Hai v Public Prosecutor* [2010] 2 MLJ 433; [2010] 2 CLJ 405).

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[35] We take it as settled law that although a court may view with suspicion a defence which has not been put to the appropriate prosecution witnesses who might have personal knowledge of the point at issue, the court is still bound to consider the defence, no matter how weak the defence is (see *Alcontara a/l* H *Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209; [1996] 1 CLJ 705, *Eastman v The Queen* (1997) 76 FCR 9, *Liza bte Ismail v Public Prosecutor* [1997] 2 SLR 454).

[36] We have carefully scrutinise the learned trial judge's evaluation of the I defence case. In our view, to say that the learned trial judge failed to appreciate the defence of the appellant was totally misconceived. The learned trial judge did not reject the appellant's defence on the simple ground of belated disclosure. In fact, at pp 338–343 of the appeal record, it is evident that Her Ladyship had carefully analysed and scrutinised the defence case before

reaching a conclusion that the defence is improbable and their existence was crafted to throw the blame onto the fictitious character.

[37] The gist of the appellant's defence was that he had no knowledge of the contents of the plastic packets. The learned trial judge, after a careful consideration of the appellant's evidence, rejected his assertion of lack of knowledge. The finding was made based on the totality of the evidence, the credibility of witnesses and how they fared in cross-examination. This is a finding of fact and we as the appellate court should be slow in interfering with such finding (see *Andy bin Bagindah v Public Prosecutor* [2000] 3 MLJ 644; [2000] 3 CLJ 289, *Wjchai Onprom v Public Prosecutor* [2006] 5 MLJ 415; [2006] 3 CLJ 724).

Ground (c): Whether there was a miscarriage of justice

[38] Another ground of challenge advocated by the appellant was that the appellant was highly prejudiced as he was being placed at a disadvantage as he is unable to fathom the tactical fulcrum required at the defence stage, be it reasonable doubt or rebuttal.

[39] In order to appreciate the submission, it is necessary to reproduce the opening statement of the prosecution. It reads as follows:

> Pihak pendakwaan akan menunjukkan bahawa tertuduh mempunyai pengetahuan langsung ke atas dadah yang dirampas tersebut melalui keterangan langsung atau secara alternatifnya menggunakan anggapan di bawah seksyen 37(d) Akta Dadah Berbahaya 1952. Pihak pendakwaan juga akan membuktikan wujudnya elemen pengedaran dadah berbahaya tersebut melalui definasi pengedaran di bahawa seksyen 2 Akta Dadah Berbahaya 1952.

[40] In our opinion, what the prosecution did was in line with the advice given in *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705 and *Public Prosecutor v Okonkwo & Anor* [1993] 3 SLR 610 that the prosecution should intimates or made known to the defence the presumption(s) which it intends to rely on. The Federal Court, through Gopal Sri Ram JCA (as he then was), in *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2006] 5 MLJ 415; [2005] 6 AMR 203 also called for the prosecution to make known in advance both to the trial judge and defence counsel the proposed presumptions it seeks to rely on. His Lordship said:

> Before we conclude, there is one final matter that requires mention. In the present case, the application by the learned trial judge of the double presumption formula appears in the main to have been caused by the prosecution's failure to specific whether it proposed to prove actual trafficking or whether it proposed to rely on the presumption under s 37(a) of the Act. We find this a common occurrence in

A prosecutions for trafficking under the Act. Trial judges and defence counsel are most often left guessing until the very end of the trial as to whether the prosecution is relying on direct evidence to prove trafficking or whether they seek to rely on the presumption under s 37(d) or s 37(da) of the Act.

B In our view, the problem is easily solved by the prosecution intimating to the defence and to the court at the first available opportunity if its case is one of actual trafficking or if it intends to rely on a presumption to establish trafficking, and if the latter be the case, to identify the precise presumption. This could be done either before the commencement of the trial or as part of the opening speech and would go a long way in assisting the defence in directing its cross-examination along appropriate lines and thereby avoiding a waste of court's time. See, *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705 applying *Public Prosecutor v Okonkwo & Anor* [1993] 3 SLR 610.

C

[41] Having said that, it is necessary to be noted that the court is not bound by the opening statement, and a verdict can be founded on a different basis from what was stated in the opening statement (see *Public Prosecutor v Sa'ari bin Jusoh* [2007] 2 MLJ 409).

D

[42] The learned trial judge, at pp 318–319 of the appeal record, made a ruling on prima facie case as follows:

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> The reason is because the accused was keeping the dangerous drugs in their hiding place in the apartment and the irresistible inference is that he was keeping them with the object of selling them at a suitable time or when it is convenient for him to do so. The word 'trafficking' is defined in s 2 of the DDA to include keeping.
>
> F Quite apart from that since the prosecution has succeeded in proving that the accused had mens rea possession of the 94.50g of methamphetamine which encompasses the minimum amount of 50g as provided in s 37(da) of the DDA, the statutory presumption of trafficking was triggered off and the accused was presumed to be trafficking in the dangerous drugs unless he was able to prove to the contrary.

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[43] In the present case, the appellant was caught with the concealed dangerous drugs. He had pointed out to the police where the drugs were hidden. Coupled with the recovery of the weighing scale, empty plastic packets, large amount of cash; it is safe to infer that the drugs were not intended for his personal consumption. Quite apart from that, the very same facts also give rise to a strong inference that the appellant was aware of his possession, knew the nature of the drugs possessed and had the power of disposal over it.

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[44] After having read the appeal records, we were satisfied that there was no miscarriage of justice that called for appellate intervention. The overwhelming evidence compelled us to agree with the decision of the learned trial judge.

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[45] In this case, there was ample, indeed overwhelming evidence at the close of the prosecution's case to warrant the conclusion of the trial judge that the prosecution had established that the appellant was concerned in trafficking in the offending drugs. As enumerated by Barwick CJ in *Ratten v The Queen* (1974) 131 CLR 510 at p 516:

> Miscarriage is not defined in the legislation but its significance is fairly worked out in the decided cases. There is a miscarriage if on the material before the Court of Criminal Appeal, which where no new evidence is produced will consist of the evidence given at the trial, the appellant is shown to be innocent, or if the court is of the opinion that there exists such a doubt as to his guilt that the verdict of guilty should not be allowed to stand. It is the reasonable doubt in the mind of the court which is the operative factor. It is of no practical consequence whether this is expressed as a doubt entertained by the court itself, or as a doubt which the court decides that any reasonable jury ought to entertain. If the court has a doubt, a reasonable jury should be of a like mind. But I see no need for any circumlocution; as I have said it is the doubt in the court's mind upon its review and assessment of the evidence which is the operative consideration.
>
> That is one instance of a miscarriage: another is where the appellant has not had a fair trial. There is no need here to refer to the various circumstances in which a trial may become unfair. Some of these are mentioned in the reasons of the Full Court. But it may be that even where there have been irregularities at the trial there may be no miscarriage of justice if the court forms the opinion that no jury of reasonable men, properly instructed and alive to their responsibilities, would fail on the evidence to convict the accused.

[46] That, however, is not the end of the matter. Having invoked s 37(da) of the DDA, the learned trial judge did not say that the defence of the appellant had not rebutted the presumption of trafficking under s 37(da) of the DDA on the balance of probabilities as exemplified by the case of *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89 (PC). Such an oversight warranted us to invoke the proviso to s 60(1) of the Courts of Judicature Act 1964 in accordance with *Khoo Hi Chiang v Public Prosecutor and another appeal* [1994] 1 MLJ 265; [1994] 2 CLJ 151; and *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259.

[47] In our judgment, the defence of the appellant had fallen far short of rebutting the presumption of trafficking on the balance of probabilities and as such, it had not raised a reasonable doubt as to his guilt which the prosecution had established beyond reasonable doubt. It is safe to convict the appellant.

A **[48]** In the result, we dismissed the appeal of the appellant. We affirmed the conviction and sentence forthwith.

Appeal dismissed.

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Reported by Afiq Mohamad Noor

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